UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 712

Cases No. 735: ALBA ET AL
No. 864: FERNANDEZ-AMON ET AL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 22 June 1993, Luis Alba, a staff member of the Economic Commission for Latin America and the Caribbean, hereinafter referred to as ECLAC, along with 52 other ECLAC staff members[1] similarly situated, filed an application requesting the Tribunal, inter alia:

"...

(a) To find that the Respondent's denial to give the Applicant[s] every reasonable consideration for a career

[1] Veronica Aldunate, Olegario Andrade, Monica Arance, Carlos Araya, Beatriz Atria, Olivia Berner (retired in 1994), Marcelo Bottero, Zaida Bozt (retired in 1994), Rosa Bravo, Maria Luz Chiappara, Maria Elena Conte, Maria Angelica Cordova, Ines Cornejo, Mercedes Cornejo, Patricia Correa, Gilberto Delgado, Maria de la Paz Diaz, Isabel Margarita Diaz, Maria Teresa Donoso, Maria Fernanda Goizueta, Jose Miguel Gonzalez (subsequently terminated), Maria Pulcheiro Graziani, Beatriz Habit, Lilian Hales, Miguel Izam, Cecilia Koch, Josette Luft, Dolores de Lemos Luizaga, Heloisa Helena de Madureira, Maria Cristina Maldonado, Rosalia Manchego, Carlos Martinez, Luis Martinez, Hector Olave, Hernan Orellana M., Carlos Peñailillo, Ivette Poull, Hugo Quintanilla, Adelaida Rahmer, Sidney Rezende, Maria Cristina Sateler, Mario Rodriguez, Maria Isabel Rojas, Sara Stiven, Marion Sturrock, Veronica Sule, Pedro Tejo, Elba Valdivia, Rudelio Vega (subsequently terminated), Sylvia Westmann, Jorge Zlatar, Hector Zuñiga Caceres.

appointment is illegal and contravenes Article 101, paragraph 1, of the United Nations Charter, and General Assembly resolution 37/126, Section IV, paragraph 5.

(b) To find that in accordance with Article 101, paragraph 1 of the Charter and General Assembly resolutions 37/126, Section IV, paragraph 5, and 38/232, Section VI, paragraph 5, the Appellant[s] [have] an acquired right to be considered for a career appointment.

(c) To find that the Appellant[s] had a satisfactory performance in the Organization.

(d) To find that the Respondent's decision is arbitrary and vitiated by lack of due process.

(e) To order the Respondent to grant the Applicant[s] a permanent, regular or indefinite appointment, that is, a career appointment.

(f) To order the Respondent to dispense ... with the requirement for a probationary appointment as a prerequisite for a career appointment."

Whereas the Respondent filed his answer on 8 December 1993;

Whereas the Applicants filed written observations on 7 March 1994;

Whereas, on 8 April 1994, Lenka Arriagada, Elena de Solminihac and Barbara Donoso filed applications containing the same pleas;

Whereas, on 12 and 28 September 1994, the Applicants submitted additional statements and a further document;

Whereas, on 18 and 28 October 1994, the Tribunal put questions to the Respondent, to which he provided answers on 24 October and 3 November 1994, on which the Applicants submitted comments on 8 November 1994;

Whereas, on 16 November 1994, the Tribunal decided to adjourn consideration of the case;

Whereas, on 5 December 1994, the Tribunal put further questions to the Respondent to which he provided answers on 23 January 1995, on which the Applicants commented on 15 February 1995;

Whereas, on 5 May 1995, Flora Fernandez-Amon, Jose Miguel González, Jose Martinez, Domingo Primante, Orlando Portuguez Jara, Luis Eduardo Vindas Solis and Rudelio Vega, former staff members of ECLAC, holding fixed-term appointments, who had been separated from the Organization on the expiration of their appointments, filed an application containing, inter alia, the following pleas:

> "(a) To find that in accordance with Article 101, paragraph 1 of the Charter and General Assembly resolutions 37/126, Section IV, paragraph 5, and 38/232, Section VI, paragraph 5, and rule 104.12(b)(iii) and 104.12(c) of the Staff Rules, the Appellants had an acquired right to be considered for a career appointment or for an indefinite one.
>
> (b) To find that the Administration had neglected the Appellants rights for a revision of their fixed-term contractual status and denied the Applicants the opportunity of obtaining a career appointment or an indefinite appointment, maintaining them in a precarious situation.
>
> (c) To find that the Administration adopted that attitude to avoid the payment of termination indemnities.
>
> (d) To find that the Administration's decision to grant a termination payment to the Appellants was a tacit acknowledgement that the Administration had not fully met the obligations stated in para. 11(a) ...
>
> (e) To find that the Appellants had a reasonable expectancy for the renewal of their fixed-term appointments.
>
> (f) To order the Respondent to pay an indemnity equivalent to that stated in Annex III of the Staff Rules, instead of the three month payment made by the Administration, for the injuries suffered by Appellants, as a result of the Administration's negligence in meeting its obligations.
>
> (g) Should the UNAT judgement be favourable to the Appellants, to order the Respondent to pay the indemnity according to the salary scale in force at the date of the UNAT judgement."

Whereas the Applicants requested the Tribunal to consider the applications filed in case No. 864 together with the applications filed in case No. 735;

Whereas the Applicants José Miguel González and Rudelio Vega had also filed an application in case No. 735, Alba et al;

Whereas, on 30 May 1995, the Respondent agreed that the cases be "joined to that of Alba et al. On the assumption that these Applicants will not allege individual facts, other than the fact of their separation ...";

Whereas the Respondent filed his answer on 6 June 1995;

Whereas, the Applicants filed written observations on 19 June 1995;

Whereas the facts in the case are as follows:

The Applicant, and the others who seek to join him in his application, are all staff members or former staff members of ECLAC, who have held fixed-term appointments, under the 100 Series, for more than five years.[2]

In its report of its Thirteenth Session in March 1989, the Staff Management Coordination Committee (SMCC) concluded that General Assembly resolution 37/126, which, inter alia, provides "that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment," had not been systematically implemented. The SMCC XIII report recommended to the Secretary-General that eligible staff members serving in core posts should be considered for permanent appointments, while those serving on posts financed from extrabudgetary sources should be considered for indefinite appointments.

In a memorandum dated 13 November 1989, the Director, Staff Administration and Training Division, Office of Human Resources Management (OHRM), informed the Heads of Administration, including

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[2] Since the filing of the first application, the Applicants José Miguel González and Rudelio Vega separated from service when their posts were abolished; the Applicants Olivia Berner and Zaida Bozt have retired. The Applicants Flora Fernandez-Amon, Jose Martinez, Domingo Primante, Orlando Portuguez Jara and Luis Eduardo Vindas Solis also separated from service when their posts were abolished.

ECLAC, that General Assembly resolution 37/126 must be implemented taking into account General Assembly resolution 41/213 mandating the Secretary-General to carry out a retrenchment and the restructuring of the Secretariat. The memorandum stated that consideration for granting of career appointments for staff in all categories "must relate to the retrenchment exercise."

In 1990, ECLAC undertook a study of the conversion of General Service staff from fixed-term to career appointments. The study noted the increased financial consequences thereof in the context of staff reduction. It also noted the policy of ECLAC to grant career appointments only to staff in posts which were financed from certain budgetary sources, which had reserves to cover potential termination indemnities.

After surveying the situation in other UN departments and regional commissions with extrabudgetary staff, the ECLAC study noted its own situation as distinguished by a large population of extrabudgetary posts, no reserves to cover indemnity payments to staff converted to career appointments, and only minimal staff attrition. The study then considered the numerical breakdown of regular and extrabudgetary posts, compared to the staff members in these posts who held career appointments, and those who had filled the posts for more than five years and were therefore potentially eligible for career appointment. The question posed by these figures was whether the regular budgetary posts "should be used as a basis for converting to career appointments only staff encumbering these posts, even though that staff has relatively low seniority," rather than using these same posts "as a reservoir against which career appointments could be given to other staff who have a materially higher seniority." After exploring several possibilities for career appointment of extrabudgetary staff, the study recommended the "post-pooling" of regular budgetary posts to allow career appointment of more senior staff serving in extrabudgetary posts.

In a memorandum dated 11 October 1990, the Executive Secretary of ECLAC reported to the Assistant Secretary-General, OHRM, and the Controller, that there were fifty fixed term staff on extrabudgetary posts with more than five years of service, half of whom had more than ten years of service. He noted that most of these staff "would qualify for career conversion from the point of view of tenure, merit and performance" but that "nothing has changed as to the temporary nature of the XB [extrabudgetary] funds." The Executive Secretary requested financial backing for the conversions in the form of "access to contingency financing, should an emergency arise in relation to potential future indemnity costs inherent in the conversions."

In a second memorandum to the Assistant Secretary-General, OHRM, and the Controller, dated 21 December 1990, the Executive Secretary of ECLAC, after acknowledging receipt of two interim replies, urged that he be sent a substantive reply.

In a memorandum dated 19 November 1990 to the Executive Secretary of ECLAC, the Applicant Alba and the others who joined him in the initial appeal, requested review of their cases for conversion of their appointments to career appointments. On 23 December 1990, they requested the Secretary-General to conduct the same review. On 26 March 1991, they lodged an appeal with the Joint Appeals Board (JAB).

In a memorandum to all Heads of Administration, including ECLAC, dated 10 April 1991, the Director, Staff Administration and Training Division, OHRM, recalling General Assembly resolution 37/126, asked that departments and offices "review their staff who have completed five years of continuing good service on fixed-term appointments and to give these staff every reasonable consideration for a career appointment." With respect to the SMCC recommendation that eligible staff serving on extrabudgetary posts be considered for indefinite appointments, the memorandum noted "this recommendation was not implemented on account of the legal and practical difficulties encountered." OHRM also requested information on the number of staff on fixed-term appointments with

more than five years of service and a breakdown of the sources of funding for their posts, as well as a forecast of the continuity of funding.

On 22 April 1992, the Assistant Secretary-General, OHRM, announced that there would be "a temporary suspension in the granting of new probationary, permanent and regular appointments" in order to facilitate the restructuring of the Secretariat.

In a memorandum to the Acting Controller, dated 2 July 1992, the Director, SATD, OHRM, noting that the JAB was considering the Applicant's appeal, sought his concurrence to inform the JAB of his proposal to SMCC XVI to establish a percentage of extrabudgetary posts that "could be deemed to be of a continuing nature," on the basis of which "a corresponding percentage of staff members could then be considered for career appointment."

On 6 October 1992, the Executive Secretary of ECLAC wrote to the Controller, that the issue of the conversion of extrabudgetary staff from fixed-term to indefinite appointments would soon enter "the crisis stage". He further noted that staff with fixed-term contracts due to expire were demanding "to be treated as having, in effect, indefinite contracts, which call for indemnities in case of non-extensions"

In a reply to this memorandum, the Officer-in-Charge, Department of Administration and Management (DAM), confirmed approval in principle for "the provision of bridging funds and some remuneration." A review of the whole situation was to be completed in January 1993. He urged that, in the meantime, ECLAC proceed with its review of staff to be affected by the lack of funding. A copy of this reply was sent to the ECLAC Staff Council. In a memorandum to the Under-Secretary-General, DAM, dated 6 January 1993, the President of the Staff Council protested the delay.

On 17 December 1992, the JAB had adopted its report. Its findings and recommendation read as follows:

"40. The Panel unanimously found

(a) That the Appellants and other staff members in the same situation were entitled to be considered for career appointments in accordance with General Assembly resolutions 37/126 and 38/232, the implementation of which was requested in the report of SMCC XIII as approved by the Secretary-General on 23 May 1989, which did not seem to have been applied at ECLAC;

(b) That the failure to make a decision on the report of SMCC XV might be detrimental to the career development of a number of Appellants;

(c) That in the absence of a decision on that report it was not in a position to examine the case on its merits.

41. The Panel unanimously recommended in the interest of good administration that the Secretary-General make a decision on paragraphs 63, 64 and 65 of the report of SMCC XV so that the mandate set forth in General Assembly resolutions 37/126 and 38/232 could be implemented.

Report and recommendations unanimously adopted by the Panel of the Joint Appeals Board."

On 25 February 1993, the Director of Personnel transmitted a copy of the JAB report to the Applicants and informed them as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has noted that the report of SMCC XIII requested consideration for career appointment only for those staff members serving on core posts. As regards the report of SMCC XV, he wishes to inform you that it was not formally approved but that the Administration agreed in April 1992 that the report should be treated as approved. He also notes that any consideration for career appointment is contingent on the needs of the service and on a determination of the percentage of extrabudgetary posts and posts financed from temporary assistance funds which will be deemed to be continuing for the purpose of granting career appointments to staff members serving under the 100 Series of the Staff Rules.

Unfortunately, the Secretary-General is unable to accept the recommendation of the JAB since on 27 April 1992 it was decided to suspend temporarily granting of career

> appointments in order to facilitate the reform of the organizational structure of the Secretariat and consequent reassignment of existing staff."

On 24 February 1993, the Under-Secretary-General, DAM, transmitted to the Chief, Division of Administration, ECLAC, a proposed text of conclusions reached on the non-renewal of contracts for staff members whose posts were being abolished. The Organization would offer those staff who served continuously for more than five years on fixed term appointments, a payment of three months' net salary.

In a letter dated 5 April 1993, the President of the ECLAC Staff Council conveyed to the Director of Personnel the dissatisfaction of the staff with the offer of 3 months' net salary, recalling the agreements reached at SMCC XV. He accused the Administration of "[going] back to earlier stances ignoring good-faith negotiations made with the representatives of staff."

In a letter dated 16 April 1993, the Under-Secretary-General, DAM, informed the Executive Secretary, ECLAC, as follows:

> "I wish to confirm that we cannot consider a termination indemnity but I am authorizing three months net salary for 100 Series staff members who have served continuously for 5 years or more in the interest of good administration and in recognition of the fact that it has not been possible to identify a percentage of posts financed from extrabudgetary sources that could be deemed 'continuing' for the purposes of consideration for a career appointment."

On 1 June 1993, the Applicant José Martinez was advised that his fixed-term appointment would not be extended upon its expiration on 30 June 1993. The Secretary-General decided to pay the Applicant three months' salary as a termination indemnity. On 9 July 1993, the Applicant requested that the Secretary-General pay him a termination indemnity "based on the fact that [he] had an acquired right to be considered as a holder of a permanent appointment or an indefinite one or a fixed term appointment up to his retirement age ..." On 16 December 1993, the Applicant lodged an appeal with the JAB. The JAB adopted its report on his case and in the cases of the

other Applicants similarly situated who had joined him in the appeal, on 17 March 1995. Its considerations and recommendation read as follows:

"Considerations

...

20. The Panel considered General Assembly resolution 37/126 (1983), in which the General Assembly '[d]ecide[d] that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment'. The Panel took note of General Assembly resolution 38/232, in which it was recommended that organizations 'dispense with the requirement for a probationary appointment as a prerequisite for a career appointment following a period of five years' satisfactory service on fixed-term contracts'. In addition, staff rule 104.12(b) (iii) provides that, 'upon completion of five years of continuous service on fixed-term appointments, a staff member who has fully met the criteria of staff regulation 4.2, and who is under the age of fifty-three years, will be given every reasonable consideration for a permanent appointment, taking into account all the interests of the Organization'. The Panel noted that the Appellant was 41 years of age in 1977, when his 16-year tenure with the Organization began, and thus met the age requirements under staff rule 104.12(b) (iii) after having completed five years of continuous service on fixed-term appointments.

21. In light of the foregoing General Assembly resolutions and staff rule 104.12(b) (iii), the Panel found that, after the Appellant had completed five years of continuous service on fixed-term appointments, the Organization had an obligation to 'give [him] every reasonable consideration for a career appointment'. Moreover, in the memorandum of 13 November 1989 from ..., Director, Staff Administration and Training Division, OHRM, to the Heads of Administration, including the Head of ECLAC, [the Director, Staff Administration and Training Division] acknowledged that '[t]he Secretary-General ha[d] approved a recommendation contained in the SMCC XIII Report to give effect to the intent of these [General Assembly] resolutions'. Furthermore, in the SMCC XV Report, which the Director of Personnel (in a letter to the Appellant dated 25 February 1993) indicated 'the Administration [had] agreed in April 1992 should be treated as approved', it was agreed as follows:

'62. ... that staff members in the General Service and related categories appointed against temporary assistance funds and posts financed from extrabudgetary resources be also considered for career appointment under the terms of GA resolution 37/126.

63. ... to propose that a percentage of extrabudgetary posts, and posts financed from temporary assistance funds would be deemed to be continuing for the purpose of granting career appointment.

...

65. ... that the ASG/OHRM would address a communication to all Heads of Offices away from Headquarters stressing the provisional and temporary nature of short-term appointments and recalling the policies and practices governing them.

...'

22. The Panel found that the Administration had neglected -- for approximately ten years -- to fulfill its obligation to give the Appellant 'every reasonable consideration for a career appointment' after he had completed five years of continuous service with the Organization. When the Administration neglects to comply with its agreed obligations or to give a staff member the fair consideration required under staff rules and regulations, as acknowledged in the Respondent's reply, 'the remedy would be an award of monetary damages for such lack of consideration or an undertaking by the Organization to provide the required consideration in the future'. Inasmuch as 'an undertaking by the Organization to provide the required consideration in the future' is meaningless in this case because the Appellant is no longer employed by the Organization, the sole remedy available is an award of monetary damages.

23. Furthermore, the Panel considered the facsimile dated 4 March 1993 from ..., former Under-Secretary-General for Administration and Management, to the Chief, Division of Administration, ECLAC, and accompanying paper of 22 February 1993 which 'set [] out the conclusions reached ... regarding the non renewal of contracts for staff members encumbering posts being abolished for the lack of funding'. The Panel considered the Administration's decision therein to award a termination payment of three months' net salary to 100 Series staff who had served continuously for 5 years or more under fixed-term appointments to reflect an acknowledgement on the part of the Administration that it had not fully met its obligations under General Assembly resolution 37/126. The Panel, however, considered such amount to be inadequate to

compensate the Appellant for the injuries he sustained as a result of the Administration's negligence in meeting its obligations.

Recommendation

24. Based on the foregoing considerations, to compensate the Appellant and the six other former ECLAC staff members in the same situation for the injuries sustained as a result of the Organization's negligence in fulfilling its obligations to them, the Panel unanimously recommends that the Organization pay to the Appellant and to each of the six other former ECLAC staff members the sum of nine additional months of pensionable remuneration."

On 28 March 1995, the Under-Secretary-General for Administration and Management transmitted to these Applicants a copy of the JAB report and informed them as follows:

"The Secretary-General has examined your case in the light of the Board's report. It is to be recalled that, you were, at the time the post which you were occupying was abolished, on a fixed-term appointment; and, on the grounds of abolition of post your contract, upon expiry, was not renewed. The Secretary-General wishes to reiterate that the Staff Rules do not provide any kind of separation payment upon expiry of fixed-term appointments, which carry no expectancy of renewal or conversion to any other type of appointment. Furthermore, separation upon expiry of a fixed-term appointment is not termination, and does not give rise to a termination indemnity under rule 109.4. Moreover the Administration did consider the problem of career appointments for ECLAC staff on extrabudgetary posts and concluded that such career appointments could not be granted, thereby discharging its obligations to grant you every reasonable consideration for a career appointment. In the light of the foregoing, the Secretary-General cannot agree with the Board's recommendations. The Secretary-General, therefore, rejects the Board's recommendation and has decided to take no action on your case.

..."

On 22 June 1993 and on 5 May 1995, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Applicants had a right to every reasonable consideration for a career appointment. Such consideration was not given.

2. The Applicants who have been separated from service had a reasonable expectancy to the renewal of their appointments and are entitled to payment of compensation equivalent to the Termination Indemnity set out in Annex III to the Staff Regulations.

Whereas the Respondent's principal contentions are:

1. Every reasonable consideration for a career appointment was granted to the Applicants.

2. Termination Indemnity is payable only to staff whose appointments have been terminated.

3. Staff are bound by the terms and conditions of their appointment, including the fact that a fixed-term appointment expires automatically on the date set out in the Letter of Appointment.

The Tribunal, having deliberated in New York from 18 to 28 October 1994 and in Geneva from 29 June to 28 July 1995, now pronounces the following judgement:

I. The Tribunal orders the joinder of the case of Luis Alba and the other 55 staff members who filed the initial appeal, with those of Flora Fernandez-Amon, Jose Miguel González, Jose Martinez, Domingo Primante, Orlando Portuguez Jara, Luis Eduardo Vindas Solis and Rudelio Vega, because the cases share significant common issues of fact and law. Although the Tribunal does not consider the case as a class action, to facilitate consideration of the issues involved, it considers the case of the Applicant Alba as a representative case.

Central to this case are (i) Article 101, paragraph 1 of the Charter which provides that "the staff shall be appointed by the

Secretary-General under regulations established by the General Assembly"; and (ii) General Assembly resolution 37/126, section IV, paragraph 5, which provides that the Assembly "decides that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment". General Assembly resolution 38/232, which recommends dispensing with the requirement of probation for a career appointment, following 5 years of service on a fixed-term contract, is not in issue in this case as it is not being contested.

II. The Applicant Alba had more than five years of continuing good service and, for the purposes of this appeal, the Respondent concedes that the professional competence of the Applicant is not in issue.

The Applicant's contention is that the Respondent did not carry out his obligation under Article 101, paragraph 1 of the Charter and General Assembly resolution 37/126 to grant the Applicant reasonable consideration for, and the opportunity of obtaining, a career appointment.

The Respondent's answer to the Applicant's case is that there is much evidence that the contractual status of ECLAC staff on fixed-term appointments was of management concern at ECLAC and that the record establishes that the Applicant was accorded every reasonable consideration for a career appointment but that lack of available funds precluded the possibility of awarding career appointments.

III. The record makes reference to a Working Group report to the Staff Management Co-ordination Committee (SMCC) in March 1989. This group recommended that the intent of the resolution should be incorporated into the Staff Rules and that eligible staff on core posts should be considered for permanent appointments, while those serving on posts financed from extrabudgetary sources should be considered for indefinite appointments under staff rule 104.12(c).

The recommendations were sent to the Secretary-General and to the Heads of Departments.

In August 1990, the ECLAC Administration completed a comprehensive analysis of the problem of awarding career appointments to staff in the situation of the Applicant.

The analysis points out that from the financial standpoint, with conversion from fixed term to career appointments, the Organization is obliged to pay staff termination indemnities in the case of discontinuation of the contract. It sets out what ECLAC's policy had been in relation to staff whose posts were financed on an extrabudgetary basis and staff whose posts were financed on a more permanent basis. In making reference to the different elements contained in resolution 37/126, it points out that the resolution does not provide financial resources, that lack of funding lies at the bottom of the problem revealed in this case. A solution to ameliorate the situation is suggested, namely that there be a radical change in the current system through a pooling arrangement between different types of posts - regular budgetary and extrabudgetary.

However, when this proposal was presented to the Administration, the Executive Secretary of ECLAC drew attention to the financial difficulties inherent in it because the proportion of extrabudgetary posts was so high. He pointed out that it was not possible to grant permanent appointments to staff by switching them to core posts because of ECLAC's very slow turnover of core posts. To convert staff to permanent appointments would open up liability for termination indemnities when the funding for the posts was reduced. Without a guarantee from Headquarters for such funds, it would not be possible for ECLAC to proceed along these lines.

In April 1992, the Secretary-General "suspended" the granting of permanent appointments. By October 1992, the financial situation in ECLAC had become so critical that it was clear that there would be a reduction of posts in 1993. Funds were not available to pay full indemnities to those seeking career appointments. A special provision was made to pay indemnities of three months in the event

of termination resulting from budget cuts of fixed-term appointments. This amount was less than what permanent staff members were entitled to. It was more, however, than staff members would have been entitled to under their fixed-term appointments.

IV. The suspension of the granting of career appointments has now been lifted and the Organization is reviewing its procedures. This is being done in the context of General Assembly resolution 37/126. However, when the Staff Rules were amended to implement the resolution, the phrase "taking into account all the interests of the Organization" was added. The Respondent's interpretation of this proviso is "... that the concept of reasonable consideration for a career appointment necessarily includes whether the Organization has need of the staff member on a career appointment and that need includes whether there is a reasonable prospect of funding."

V. In the Tribunal's view, the financial constraints of the Organization may be one of the factors to be considered in the granting of career appointments. The Tribunal notes that the Applicant himself apparently acknowledges that financial considerations are not irrelevant to the granting of career appointments, as demonstrated by his endorsement of the proposed pooling arrangement referred to above. The Applicant argues, however, that, within these financial constraints, there should not be distinctions made between staff members based on the underlying source of funding for their posts. The consequence of such a distinction appears to be that long-serving staff members, whose performance is satisfactory, might not even be considered for career appointments because they are serving on extrabudgetary posts, while other staff members with considerably shorter service would be considered for permanent appointment after five years because their posts are funded from the regular budget. The Tribunal agrees with the Applicant that this practice of excluding an entire group of staff even from consideration for career appointment is unfair. The

General Assembly resolution makes no such distinction among staff members in granting them the right to every reasonable consideration for career appointment.

VI. From the record, it appears that a further complicating factor in the process is that the underlying source of funding for any given post may change. The same staff member would, in such circumstances, be eligible for consideration at one time and not eligible for consideration at another time, based on administrative arrangements over which he or she has no control or perhaps even knowledge.

VII. The Tribunal understands from the Respondent's communication of 26 December 1994, that, with the lifting of the freeze, ECLAC's Management will review its staffing situation with a view to establishing "a fair system which will permit the review of all staff members holding fixed term appointments", including those in the General Service category. According to the Respondent, ECLAC will extend the appointments of all Applicants on a fixed-term basis, for periods ranging from six to twelve months, from 1 January 1995, "without prejudice to the results of a review for conversions which could be undertaken during this period." The Respondent also stated that "since it is not expected to discontinue the appointments of any of the Applicants, it is not envisaged that indemnities will have to be paid as a result of non-extension of appointments."

VIII. The Tribunal recognizes the financial constraints under which the Respondent has to operate and the efforts which are being made to deal with the problems exemplified by this case. However, a solution in accordance with resolution 37/126 must treat staff members equally, that is without distinctions based on sources of funding, regardless of how many, or how few, permanent appointments the Organization can afford to grant.

The Tribunal is of the view that merit of performance combined with length of service are the factors with regard to individual staff members which should be primary in granting reasonable consideration for career appointment. While the general financial framework might ultimately determine whether or not career appointments can be granted, the source of funding for an individual staff member's post cannot justify the failure to even consider him or her for a career appointment after years of good service, if career appointments are being granted by the Organization.

IX. The Tribunal therefore finds for the Applicant Luis Alba, and orders the Respondent to give him and the other similarly situated Applicants every reasonable consideration for career appointment, in accordance with a system which does not distinguish between staff members in regular and extrabudgetary posts.

X. The Tribunal notes that those Applicants whose posts have already been abolished, the Applicants Flora Fernandez-Amon, Jose Miguel González, Jose Martinez, Domingo Primante, Orlando Portuguez Jara, Luis Eduardo Vindas Solis and Rudelio Vega, have been paid indemnities of three months. Based on the manner in which the implementation of resolution 37/126 has been handled to date, the Tribunal finds that these staff members were deprived of reasonable consideration for a career appointment. It does not follow that had they been accorded such consideration they would have in fact been granted permanent appointments. Their denial of the opportunity, however, merits compensation. Had they been granted career appointments, their termination indemnity would have been based on length of service. In an effort to give them compensation proportionate to their length of service, the Tribunal awards them one month salary for each two years of their service, less the indemnities they have already received.

XI. For the foregoing reasons, the Tribunal orders the Respondent:

(a) To pay to the Applicants Flora Fernandez-Amon, Jose Miguel González, Jose Martinez, Domingo Primante, Orlando Portuguez Jara, Luis Eduardo Vindas Solis and Rudelio Vega, a termination indemnity of one month for each two years of their service, less the three months of termination indemnities already received;

(b) To grant the Applicant Luis Alba and all other Applicants similarly situated consideration for a career appointment, in accordance with the criteria set forth above.

XII. The Tribunal rejects all other pleas of the Applicants.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 28 July 1995

R. María VICIEN-MILBURN
Executive Secretary